

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 478

WEST POINT WHOLESALE GROCERY COMPANY,
APPELLANT,

vs.

THE CITY OF OPELIKA, ALABAMA

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF
ALABAMA

INDEX

	Original	Print
Record from the Circuit Court of Lee County, State of Alabama	1	1
Caption (omitted in printing)	1	
Summons and complaint	1	1
Defendant's demurrer to plaintiff's complaint	7	9
Judgment sustaining defendant's demurrer to complaint and judgment entering a non-suit	9	11
Notice of appeal and security for costs on appeal	10	12
Appeal citation to Court of Appeals (omitted in printing)	10	
Clerk's certificate (omitted in printing)	12	
Proceedings in the Court of Appeals of the State of Alabama, Fifth Division	13	13
Assignments of error	13	13
Judgment	14	14
Opinion, Price, J.	15	14
Application for rehearing	16	16
Order overruling application for rehearing	17	16

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., FEB. 5, 1957

	Original	Print
Proceedings in the Supreme Court of the State of Alabama	19	17
Petition for writ of certiorari	19	17
Order denying writ of certiorari and dismissing petition	24	21
Clerk's certificates (omitted in printing)	25	
Notice of appeal to the Supreme Court of the United States (filed in Court of Appeals of Alabama)	27	21
Order noting probable jurisdiction	31	24

[fol. 1]

[Caption omitted]

1

**IN CIRCUIT COURT OF LEE COUNTY, STATE OF
ALABAMA**

SUMMONS AND COMPLAINT—Filed December 30, 1953

To any Sheriff of the State of Alabama, Greetings:

You are hereby commanded to summon City of Opelika, Alabama, a Municipal Corporation, organized and existing under the laws of the State of Alabama, to appear in the Circuit Court of Lee County, Alabama, at the usual place of holding the same, within thirty (30) days after the service of a copy of this Summons and Complaint upon it, then and there to answer the Complaint of West Point Wholesale Grocery Company, a corporation.

Witness my hand, this the 30 day of December, 1953.

(Signed) W. O. Brownfield, Clerk.

COMPLAINT

1. The Plaintiff claims of the Defendant, City of Opelika, a municipal corporation organized and existing under the laws of the State of Alabama, the sum of Two Hundred Fifty and 50/100 (\$250.50) Dollars, for that during the period, to-wit: January 1st, 1953, to and including the date of the filing of this Complaint, Plaintiff was, and is now, a nonresident of the State of Alabama, being a corporation organized and existing under the laws of the State of Georgia and was, during said time, engaged in the wholesale grocery business, and from time to time, during said period, sold and delivered in interstate commerce certain of its groceries to retail merchants, located and doing business in said City of Opelika, that Plaintiff had no office, storeroom or place of business whatsoever within the State of Alabama, that Plaintiff had no inventory or store of goods within the State of Alabama for the purpose of making deliveries in the State of Alabama or for any other purpose, but that such sales were purely [fol. 2] interstate (Transcript page 2) sales made upon orders given to Plaintiff's salesman and representative

upon his solicitation of such orders from said retail merchants, which orders were transmitted or delivered by said salesman or representative to Plaintiff, at its place of business in the City of West Point, in the State of Georgia, where the orders were accepted, whereupon the groceries so ordered were loaded upon Plaintiff's trucks at its place of business in said City of West Point in the State of Georgia, and unloaded at said retail merchant's place of business at the end of a continuous movement in interstate commerce from Plaintiff's said place of business in the State of Georgia to the purchasers' places of business in the City of Opelika.

Plaintiff further alleges that during said period, to-wit: from January 1st, 1953, to and including the day on which this Complaint is filed, the Defendant, said City of Opelika, had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a "License Schedule" for said City of Opelika, Alabama, being "An ordinance to fix and prescribe the rates of license or privilege taxes for trades, vocations, professions, and other business conducted within the City of Opelika, Alabama", which ordinance imposed a tax upon wholesale merchants as will appear from said "schedule" which in words and figures, pertinent here, is as follows, to-wit:

"82. MERCHANTS, WHOLESALE:

Where a gross annual business is:

\$100,000.00 and less	\$ 35.00
Over \$100,000.00 and less than \$200,000.00	50.00
\$200,000.00 and less than \$500,000.00	75.00
\$500,000.00 and less than \$1,000,000.00	100.00
\$1,000,000.00 and less than \$2,000,000.00	200.00
\$2,000,000.00 and over	250.00

And in addition thereto, one-sixteenth (1/16) of one percent (1%) on the first \$500,000.00 gross receipts plus one-twentieth (1/20) of one percent (1%) on the next \$500,000.00 gross receipts plus one-fortieth (1/40) of one percent (1%) on all gross receipts over one million dollars (\$1,000,000.00)."

And Plaintiff further alleges that during said period said Defendant City had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a "License Schedule", being "An ordinance to fix and prescribe the rates for license or privilege taxes for trades, vocations, professions, and other businesses conducted within the City of Opelika, Alabama", which ordinance imposed a tax upon "Transient or Itinerant" merchants, as will appear from said "Schedule" which in words and figures, pertinent here, is as follows, to-wit:

[fol. 3] "130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company who unloads, delivers, distributes or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only \$100.00"

Plaintiff further alleges that by an ordinance which was enacted by said Board of Commissioners and which became effective on, to-wit: January 21st, 1953, (Transcript page 3) said license schedule was amended, said amendment as advertised and published in Opelika Daily News, a newspaper published in said City; in its issue of January 21st, 1953, being as follows, to-wit:

ORDINANCE No. 103-53

An Ordinance to Amend Ordinance No. 101-53, entitled City License Schedule for 1953.

Be it Ordained by the Board of Commissioners of the City of Opelika, Alabama, as follows:

1. That Ordinance No. 101-53 of the City of Opelika, Alabama, entitled City License Schedule for 1953, be amended by adding thereto sub-section 130(a), as

hereinafter set forth, and by amending sub-section 130 thereof to read as follows:

130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company, except persons, firms or corporations engaged in the wholesale grocery business delivering, distributing or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes, of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only \$100.00.

130(a) TRANSIENT OR ITINERANT-WHOLESALE GROCERS:

Each person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, Annual Only \$250.00.

2. This ordinance shall become effective immediately after the publication.

Adopted and Approved this the 20th day of January 1953.

(S.) Ealon M. Lambert, President of the Board of Commissioners of the City of Opelika, Alabama.

Attest:

W. F. Pearson, City Clerk
(Adv. 21)."

Plaintiff further alleges that the above quoted provisions are some of many provisions in said ordinance,

constituting the "City License Schedule" adopted by said City of Opelika.

[fol. 4] Plaintiff further alleges that said City of Opelika, upon the passage of said amended ordinance, demanded that Plaintiff pay said license tax of \$250.00 together with an issuance fee of 50c, under penalty of being adjudged in violation of law and subject, as shown by that section of "City License Schedule for 1953" then in force and effect, to fine and imprisonment, which section is in words and figures as follows:

"d. PENALTIES:

It shall be unlawful for any person, firm, or corporation, to engage in any of the businesses or vocations for which a license may be required without first having procured a license therefor, and any violation hereof shall constitute (Transcript page 4) a criminal offense and shall be punishable by fine not to exceed one hundred (\$100.00) dollars for each offense and by imprisonment not to exceed thirty days and not less than the amount of the licenses, either or both at the discretion of the Court trying the same, and each day when such business or vocation is conducted without such license shall constitute a separate offense."

Plaintiff further alleges that it paid said license tax of \$250.00, and issuance fee of 50 cents, so demanded by said Defendant City.

Plaintiff further alleges that the aforesaid deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of West Point in the State of Georgia to the places of business of the purchasing retail merchants in said city of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce.

Plaintiff further alleges that the aforesaid ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, are arbitrary, unreasonable and discriminatory.

in that they differentiate between interstate commerce and intrastate commerce, setting up everyone "who unloads, delivers, distributes or disposes of any goods, wares, merchandise or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama", as one classification taxed in one way, namely, a flat-sum, and those who unload, deliver, distribute; or dispose of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, other than [fol. 5] goods, wares, merchandise, or produce transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, as a separate classification taxed in a different way, namely, apportioned on the basis of gross receipts.

Plaintiff further alleges that said ordinance of said City of said City (sic) of Opelika, Alabama, and the license taxes levied thereunder, are arbitrary, unreasonable and discriminatory, in that they differentiate among interstate merchants properly in the same class as Plaintiff, said ordinance setting up everyone "engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama," as one classification taxed at \$250.00 per year, and setting up everyone "except, firms, or corporations engaged in the wholesale grocery business delivering, distributing, or disposing of groceries at wholesale, who unloads, delivers, distributes; or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise, or produce was transported from a point without the City of Opelika, Alabama, to a point (Transcript page 5) within the City of Opelika, Alabama", as one classification taxed at \$250.00 per year, and setting up everyone "except persons, firms, or corporations engaged in the wholesale grocery business delivering, distributing, or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares,

merchandise, or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama", as a separate classification taxed at \$100.00 per year.

Plaintiff further alleges that the said ordinance of said City of Opelika, Alabama, and the flat-sum license tax levied and applied to this Plaintiff thereunder, are arbitrary, unreasonable and discriminatory, in that they are not uniform in their burden upon those in the class set up by said ordinance of which Plaintiff is a member, said ordinance taxing everyone "engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, [fol. 6] Alabama", at \$250.00 per year without any apportionment upon any basis whatsoever.

Plaintiff further alleges that said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, as applied to this Plaintiff are arbitrary, unreasonable and discriminatory, creating a burden upon interstate commerce, in that they discriminate between solicitation of business in interstate commerce and solicitation of business in intrastate commerce, said ordinance taxing "each person, firm or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, which are transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama", at a flat sum of \$250.00 per year, while a person, firm, or corporation engaged in the wholesale grocery business who unloads, delivers, distributes or disposes of groceries at wholesale in the City of Opelika, Alabama, other than groceries transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama, is taxed on the basis of its gross receipts, and may pay a much smaller tax even though its gross sales are the same as those of the person, firm or corporation engaged in interstate commerce who must pay the flat-sum of \$250.00.

Plaintiff further alleges that because of such discrimination as set forth above, the said ordinance of said City

of Opelika, Alabama, and the flat-sum license tax levied and applied to this Plaintiff thereunder, deprived Plaintiff of its property without due process of law. (Transcript page 6)

Plaintiff further alleges that for all of the facts and reasons hereinabove set forth said ordinance of said City of Opelika, Alabama, and the license tax levied thereunder, violate and are contrary and repugnant to the Constitution of the United States and the Constitution of Alabama, and in particular Article I, Section 8, Clause 3, and Article IV, Section 2 of the Constitution of the United States, the Fourteenth Amendment to the Constitution of the United States, and Sections 1 and 35 of the Constitution of Alabama all of which results in said ordinance and tax being illegal and void.

Plaintiff further alleges that on or about February 15, 1953, it paid to said City of Opelika, the sum of \$250.00 and an issuance fee of 50 cents demanded and exacted of it under [fol. 7] and by virtue of said ordinance, namely: License Schedule 130(a), and Plaintiff avers that said sums of \$250.00 and 50 cents were paid by Plaintiff to said Defendant City of Opelika, under mistake of law or fact and that said City of Opelika, now retains the same, and Plaintiff therefore claims of said Defendant City of Opelika the sum of \$250.50 for money on, to-wit: February 15th, 1953, had and received by said Defendant City of Opelika, which sum of money, to-wit: \$250.50, with the interest thereon, is still unpaid.

(Signed) Denson & Denson, Yetta G. Samford, Jr.,
Attorneys for Plaintiff.

I, Ealon M. Lambert, as President of the Board of Commissioners of City of Opelika, Alabama, do hereby accept service of a copy of the foregoing Summons and Complaint and waiver (sic) other or further service.

This December 29th, 1953.

(Signed) Ealon M. Lambert, As President of the
Board of Commissioners, as aforesaid.

Filed in office, this 30 day of Dec. 1953.

IN CIRCUIT COURT OF LEE COUNTY
STATE OF ALABAMA

DEFENDANT'S DEMURRER TO PLAINTIFF'S COMPLAINT—Filed
Dec. 31, 1953

Now comes the defendant, City of Opelika, Alabama, a municipal corporation organized and existing under the laws of the State of Alabama, by its attorneys, in the above styled cause, and demurs to the plaintiff's complaint, and as grounds of demurrer assigns the following, separately and severally, to-wit:

1. The allegations of the complaint state no cause of action against the defendant.

2. The complaint contains allegations which are contradictory of each other and cause the complaint to be vague and not sufficiently clear to apprise the defendant (Transcript page 7) of what it must defend against, in the following respect, to-wit: it is alleged in the complaint, in substance, that during the period from January 1st, 1953, to and including the day on which the complaint is filed, that the defendant had in full force and effect an ordinance, enacted by its Board of Commissioners, which fixed and prescribed a "License Schedule" for said City of Opelika, and which ordinance imposed a tax "Transient or Itinerant" [fol. 8] and merchants, in words and figures as follows:

130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company who unloads, delivers, distributes or disposes of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama to a point within the City of Opelika, Alabama, Annual
Only

100.00

whereas, it is also alleged in the complaint that on January 21, 1953 said license schedule was amended, so as to cause Section 130 to read as follows:

130. TRANSIENT OR ITINERANT:

Each person, firm, corporation or motor transportation company, except persons, firms or corporations engaged in the wholesale grocery business delivering, distributing or disposing of groceries at wholesale, who unloads, delivers, distributes, or disposes, of any goods, wares, merchandise, or produce in the City of Opelika, Alabama, which said goods, wares, merchandise or produce was transported from a point without the City of Opelika, Alabama, to a point within the City of Opelika, Alabama,
 Annual Only \$100.00

3. The allegations in the plaintiff's complaint that "the deliveries and unloadings by it from its trucks were of groceries in interstate commerce at the end of continuous interstate movements from Plaintiff's place of business in the City of Columbus in the State of Georgia to the places of business of the purchasing retail merchants in said City of Opelika, Alabama, and that said ordinance of said City of Opelika, Alabama, and the license tax levied and applied to this Plaintiff thereunder constitute an undue burden upon such interstate commerce", is a mere conclusion of the pleader.

4. It appears from the plaintiff's complaint that the plaintiff is seeking to recover the amount paid by it to defendant as a license, under certain provisions of defendant's License Schedule for 1953, on the ground that the provisions of the said License Schedule under which plaintiff paid the money to defendant, imposed an undue burden upon interstate commerce, whereas, it affirmatively appears from the allegations in the complaint that the acts done by plaintiffs, and the business engaged in by the plaintiff, for which plaintiff paid the license fee sought to be recovered,

constitute intrastate commerce and not interstate commerce.

5. For aught appears from the plaintiff's complaint, the amount of the license provided and imposed upon the plaintiff by the sections of the defendant's City License Schedule for 1953, mentioned in the complaint, was not in excess [fol. 9] of the license fee for any other exhibition, trade, business or occupation of the (Transcript page 8) same class.

6. The plaintiff's complaint seeks to recover from defendant a certain sum of money alleged to have been paid by defendant as a license fee or tax for 1953 under defendant's City License Schedule for 1953, and alleges that the provisions of the License Schedule or ordinance, under which plaintiff so paid such money, are illegal and void in that same are arbitrary, unreasonable and discriminatory, whereas, for aught that appears from the allegations in the complaint the ordinance in question does not impose an undue burden upon interstate commerce, designates a reasonable basis for classification, and that the levy applies equally to all within the same class and imposes a like tax upon all who engage in the vocation or who may exercise the privilege tax.

7. The complaint contains many conclusions of the pleader.

(Signed) McKee & Maye, Attorneys for Defendant.

Filed this 31st day of December, 1953.

IN CIRCUIT COURT OF LEE COUNTY

JUDGMENT SUSTAINING DEFENDANT'S DEMURRER TO COMPLAINT
AND JUDGMENT ENTERING A NON-SUIT—June 13, 1954

This cause coming on to be heard is submitted to the Court upon the demurrer of the defendant to the complaint.

Upon consideration, the Court is of the opinion that the demurrer of the defendant filed to the complaint in this cause is well taken and ought to be sustained.

It is, therefore, considered, ordered and adjudged by the court that the demurrer of the defendant filed to the complaint in this cause be and the same is hereby sustained.

The Plaintiff thereupon reserved an exception to the ruling of the Court, and thereupon moved for a non-suit and Plaintiff now takes a non-suit on account of said adverse ruling of the Court, and it is, therefore, further considered, ordered and adjudged by the Court that a non-suit be and the same is hereby entered in this cause, and that the defendant go hence and have and recover of the plaintiff all costs in this behalf, expended, for which let execution issue.

Done this the 13th day of June, 1954.

[fols. 10-11] (Signed) Will O. Walton, Judge.

Filed in office, this 15 day of June 1954.

IN CIRCUIT COURT OF LEE COUNTY

NOTICE OF APPEAL AND SECURITY FOR COSTS OF APPEAL—
Filed June 22, 1954

Comes now the plaintiff in the above styled cause and hereby appeals to the Court of Appeals of Alabama from the final judgment in the Circuit Court of Lee County, Alabama, At Law, rendered in the above styled cause on the 14th day of June, 1954.

(Signed) Denson & Denson, Yetta G. Sanford, Jr.,
Attorneys for said Plaintiff.

Filed this the 22nd day of June, 1954.

I hereby acknowledge myself security for costs for the above and foregoing appeal.

(Signed) N. D. Denson.

The foregoing security for costs of said appeal, taken, approved and filed, this 22nd day of June, 1954.

(Signed) W. O. Brownfield, Clerk.

Citation in usual form showing service on Carl Maye omitted in printing.

[fol. 12] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 13] IN THE COURT OF APPEALS OF THE STATE OF
ALABAMA, FIFTH DIVISION

WEST POINT WHOLESALE GROCERY COMPANY, a Corporation,
Appellant,

vs.

CITY OF OPELIKA, ALABAMA, a Municipal Corporation,
Organized and Existing Under the Laws of The State
of Alabama; Appellee

ASSIGNMENTS OF ERROR

Now comes the Appellant, Plaintiff in the cause below, and shows unto the Court that manifest error has been committed on the trial of this cause in the Court below, to its great damage, and as grounds of error, assigns the following:

1. The Court erred in sustaining the Defendant's demurrer to the complaint of the Appellant. (See Transcript, page 8).
2. The Court erred in not overruling Defendant's demurrer to Appellant's complaint. (See Transcript, page 8).
3. The Court erred in rendering judgment for the Defendant in the cause below on the pleadings. (See Transcript, page 8).
4. The Court erred in rendering its judgment dated June 14, 1954. (See Transcript, page 8).
5. The Court erred in holding that the complaint was insufficient as against the grounds of demurrer assigned to it by the Defendant. (See Transcript, page 8.)

(Signed) Denson & Denson, Yetta G. Samford, Jr.,
Attorneys for Appellant.

There is no error in the record.

(Signed) J. Arch McKee, Attorney for Appellee.

[fol. 14] IN THE COURT OF APPEALS OF ALABAMA

WEST POINT WHOLESALE GROCERY COMPANY

v.

CITY OF OPELIKA

Appeal from Lee Circuit Court

JUDGMENT—February 21, 1956

Come the parties by attorneys, and the record and matters therein assigned for errors, being submitted on briefs and duly examined and understood by the court, it is considered that in the record and proceedings of the Circuit Court there is no error. It is therefore considered that the judgment of the Circuit Court be in all things affirmed. It is also considered that the Appellant and N. D. Denson, surety on the appeal bond, pay the costs of appeal of this Court and of the Circuit Court.

[fol. 15] IN THE COURT OF APPEALS OF ALABAMA

OPINION

PRICE, Judge:

This suit was brought by appellant, West Point Wholesale Grocery Company, a corporation, seeking to recover monies paid as license fees under an ordinance of the City of Opelika.

Defendant's demurrers to the complaint were sustained and plaintiff took a non-suit and perfected this appeal.

The complaint alleges:

(The complaint is here set out, ante pages 1-7.)

The legality of the tax provided for under quoted Section 130(a) of the ordinance is challenged on the ground (1) that it imposes an undue burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Federal Constitution, and (2) that it is arbitrary, unreasonable and discriminatory in that it differentiates between interstate

and intrastate commerce; differentiates between interstate merchants properly in the same class as appellant, because that said classification 130(a) fixes a license fee of \$250.00 while classification 130 fixes a fee of \$100.00; a flat sum license tax is levied without regard to the amount of business each year; discriminates between itinerant wholesale grocery merchants and local wholesale merchants in that the local merchants are taxed on a graduated gross receipts basis while itinerant wholesale grocers are required to pay a flat-sum license.

The ordinance is essentially identical with those previously considered and held valid in *Sanford v. City of Clanton*, 31 Ala. App. 253, 15 So. 2d 303, cert. den. 244 Ala. 671, 15 So. 2d 309; *Sanford Service Company v. City of Andalusia*, 36 Ala. App. 74, 55 So. 2d 854 cert. den. 256 Ala. 507, 55 So. 2d 856; *City of Enterprise v. Fleming*, 240 Ala. 460, 199 So. 691, 692.

The ordinance applies equally to deliberies of wholesale groceries in the City of Opelika, regardless of whether the transportation began within or without the State, therefore, defendant's contention that it differentiates between intrastate and interstate commerce is without merit. *Sanford v. City of Clanton*, supra; *Sanford Service Co. v. City of Andalusia*, supra.

The basis of classification is a reasonable one and applies equally to all within the class, *City of Enterprise v. Fleming*, supra; *Woco Pop Co. of Montgomery v. City of Montgomery*, [fol. 16] 219 Ala. 73, 121 So. 64; *American Bakeries Co. v. City of Huntsville*, 232 Ala. 612, 168 So. 880, and it is not discriminatory because a different tax was required of itinerant persons, unloading, delibering, distributing or disposing of goods, wares, merchandise, or produce, other than wholesale groceries.

There is no merit in appellant's contention that the tax is dicriminatory because it imposes upon the local wholesale merchant a graduated scale gross receipts tax for the privilege of engaging in local business, while appellant must pay a fixed-sum license tax. "It is well settled that a schedule of licenses may be prescribed for an itinerant person, firm or corporation different from that prescribed for one having an established place of business within the municipi-

pality." *American Bakeries v. City of Opelika*, 229 Ala. 388, 157 So. 206; *American Bakeries Co. v. City of Huntsville*, 232 Ala. 612, 168 So. 880.

Likewise, we find no merit in appellant's contention that all fixed-sum license taxes necessarily discriminate against interstate commerce. As was said by Judge Simpson in *Sanford v. City of Clanton*, supra " * * * the principle has been narrowly limited to fixed-sum license taxes imposed on the business of soliciting orders for purchase of goods to be shipped interstate."

We are of the opinion the complaint does not allege sufficient facts to support the conclusions of the pleader as to the charge of unlawful discrimination against appellant or to show that the requirement that appellant pay the license fees constitutes an illegal burden on interstate commerce. The demurrer was properly sustained.

The judgment of the circuit court is affirmed.

Affirmed.

IN THE COURT OF APPEALS OF ALABAMA

APPLICATION FOR REHEARING—Filed March 2, 1956

Comes now West Point Wholesale Grocery Company, Appellant in the above styled cause, by its attorneys, and moves this Honorable Court to grant it a rehearing in this cause and to set aside, annul, and hold for naught its judgment heretofore rendered on February 21st, 1956, affirming the judgment of the Circuit Court of Lee County, Alabama, in favor of Appellee and against this Appellant.

(Signed) Denson & Denson, Yetta G. Sanford, Jr.,

Attorneys for Appellant.

[fols. 17-18] IN THE COURT OF APPEALS OF ALABAMA

ORDER OVERRULING APPLICATION FOR REHEARING—April 3, 1956

It is ordered that the application for rehearing be and the same is hereby overruled.

[fol. 19] IN THE SUPREME COURT OF ALABAMA

WEST POINT WHOLESALE GROCERY COMPANY, Plaintiff

VS.

CITY OF OPELIKA, ALABAMA, a Municipal Corporation,
Appellee

PETITION FOR WRIT OF CERTIORARI—Filed April 10, 1956

To the Honorable Chief Justice and Associate Justices of
the Supreme Court of Alabama:

Your Petitioner, West Point Wholesale Grocery Company, a Corporation, organized and existing under the laws of the State of Georgia, and having its principal place of business in the City of West Point, Troup County therein, hereby respectfully petitions this Honorable Court to review, revise, reverse, hold for naught and determine the judgment rendered by the Court of Appeals of Alabama on the 21st day of February, 1956, in that certain cause on appeal in that Court, numbered and styled 5th Div. 548, West Point Wholesale Grocery Company, a Corporation, Appellant, vs. City of Opelika, Alabama, a Municipal Corporation, on appeal from Lee Circuit Court, which said judgment of said Court of Appeals affirmed the judgment of the Circuit Court of Lee County in favor of Appellee and against your Petitioner.

Your Petitioner further shows that, within the time allowed by law, it duly filed its application for rehearing in said Court of Appeals, raising the points hereinafter set out, and that said application for rehearing was decided adversely to Your Petitioner by said Court of Appeals on the 3rd day of April, 1956.

[fol. 20] Petitioner further shows that it was, at times pertinent here, engaged in the wholesale grocery business in West Point, Georgia, and was selling and delivering groceries to retail merchants in Opelika on orders taken therefor by its salesmen and which were transmitted by them to its home office in West Point, Georgia, from which point deliveries were later made by truck to Opelika merchants. On February 15, 1953, said City exacted from Petitioner, as a license fee or tax for carrying on its business in Opelika,

the sum of \$250.00, and 50 cents for issuance of license, under ordinances which it claimed were in full force and effect, and due to be paid by Petitioner to do business in Opelika, and Petitioner further shows that it believed and still believes that said sums were wrongfully exacted of it and that such payment was made under mistake of law or fact, and that said ordinances were then null and void, being contrary to the provisions of the Constitution of the United States and the State of Alabama, and that Petitioner heretofore filed its suit in said Lee Circuit Court to recover said sums, alleging in its Complaint, substantially, that said license fee or tax was wrong, illegal and invalid for that it imposed an undue burden on interstate commerce in violation of Article 1, Section 8, Clause 3 of the Federal Constitution, that said ordinances were arbitrary, unreasonable and discriminatory in that they differentiated between interstate and intrastate commerce unreasonably, that they differentiated between interstate merchants in the same class in that certain of said ordinances fixed a license fee of \$250.00, while others fixed a fee of \$100.00, that said ordinances fixed a flat sum license fee, applying to Petitioner, without regard to the amount of business done in Opelika by Petitioner, that said ordinances discriminated between itinerant wholesale merchants and local wholesale merchants, in that local merchants were taxed on a graduated gross receipts basis, while itinerant wholesale grocers were required to pay a flat-sum license.

[fol. 21] The Appellee filed its demurrer to Petitioner's Complaint, the Trial Court sustained the same and because of such adverse ruling, Petitioner was forced to, and took a non-suit, appealing to said Court of Appeals, where, as heretofore stated, that Court affirmed the rulings of the Trial Court on February 15th, 1956, and then overruled Your Petitioner's application for a rehearing.

Petitioner's contentions and issues raised by Petitioner's assignments of error in the Court of Appeals, are the insufficiency of the grounds of demurrer to call for consideration of same by the Court and the sufficiency of the allegations of the Complaint to present a case for Petitioner, showing that the ordinances in question are wrong, illegal and invalid as being contrary to the Constitution and laws of the United States and of the State of Alabama.

Briefs filed by the parties in the Court of Appeals were largely directed to these points.

The Court of Appeals held that the demurrer was sufficient to call for Court's consideration and affirmed the Trial Court's judgment, which sustained said demurrer and also sustained the Trial Court's ruling and held that the Complaint was insufficient to present and show that the ordinances in question were illegal and void as being unreasonable and illegally discriminatory as against Petitioner and otherwise objectionable as set forth in Petitioner's Complaint, and particularly erroneously held, as follows:

"We are of the opinion the Complaint does not allege sufficient facts to support the conclusions of the pleader as to the charge of unlawful discrimination against Appellant or to show that the requirement that Appellant pay the license fee constitutes an illegal burden on interstate commerce. The demurrer was properly sustained."

Your Petitioner submits and shows that the Court of Appeals erred in affirming and failing to reverse the judgment of said Circuit Court, in the following ways, to-wit:

The Court of Appeals erred in holding:

1. That the demurrer filed by Appellee to Petitioner's Complaint in the Circuit Court was sufficient in substance [fol. 22] to call forth the consideration of the Court thereof.

2. That Petitioner's Complaint did not allege sufficient facts to support Petitioner's conclusions as to the charge of unlawful discrimination against Petitioner.

3. That Petitioner's Complaint did not allege sufficient facts to show that the requirement that Petitioner pay the license fee constituted an illegal burden on interstate commerce.

4. That the rulings and judgment of the Trial Court were correct and in affirming same.

5. The Court of Appeals erred in affirming and in failing to reverse the rulings and judgment of the Trial Court.

6. The Court of Appeals erred in rendering judgment for Appellee.

Wherefore, Your Petitioner respectfully prays that a Writ of Certiorari be issued out of and under the seal of this Court, directed to said Court of Appeals, commanding and requiring said Court to certify and send to this Court on a day certain to be designated by this Court, a full and complete transcript of the record and all proceedings of said Court of Appeals, in the cause numbered and entitled as aforesaid, to the end that this cause may be reviewed and determined by this Honorable Court as provided by law and the rules and practice of this Honorable Court, and that this Court thereupon proceed to review and correct the errors complained of, and to reverse the judgment of said Court of Appeals, or render such judgment as said Court should have rendered.

Petitioner further prays that this Honorable Court suggest and require said Court of Appeals to stay or recall its certificate of affirmance of said cause during the pendency of this petition.

And Petitioner prays for such other, further and additional relief in the premises as to this Court may seem appropriate and to which it may be entitled, and Your Petitioner will ever pray, etc.

[fol. 23] Submitted herewith is a Brief in support of this Petition.

Respectfully Submitted, (S.) Denson & Denson, Yetta
G. Samford, Jr., Attorneys for Petitioner.

Duly sworn to by N. D. Denson jurat omitted in printing.

I hereby certify that I delivered a copy of the foregoing Petition to Messrs. McKee & Maye, Attorneys of record for Appellee in this cause, on the 9th day of April, 1956.

(S.) N. D. Denson, Of Counsel for Petitioner.

[fol. 24] IN THE SUPREME COURT OF ALABAMA

[Title Omitted]

ORDER DENYING WRIT OF CERTIORARI AND DISMISSING PETITION
—May 24, 1956

Comes the Petitioner, West Point Wholesale Grocery Company, a Corporation, by Attorneys, and the Petition for Writ of Certiorari to the Court of Appeals being submitted on briefs and duly examined and understood by the Court,

It is considered and ordered that the Writ of Certiorari to the Court of Appeals be and the same is hereby denied, and that the Petition be and the same is hereby dismissed at the cost of the Petitioner, West Point Wholesale Grocery Company, a Corporation, for which costs let execution issue accordingly.

[Writ Denied: Petition Dismissed] (No Opinion): Merrill, J.

Livingston, C. J., Lawson and Stakely, JJ., concur

[fol. 25] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 26] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 27] IN THE ALABAMA COURT OF APPEALS

WEST POINT WHOLESALE GROCERY COMPANY

v.

CITY OF OPELIKA

Appeal from Lee Circuit Court

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—August 9, 1956

1. Notice is hereby given that West Point Wholesale Grocery Company, the appellant above named, hereby appeals to the Supreme Court of the United States from the final

judgment of the Alabama Court of Appeals, 5th Division, entered in this action on February 21, 1956, which judgment affirmed a judgment of the Lee Circuit Court of Alabama sustaining demurrers to appellant's complaint. (A petition for writ of certiorari was applied for to the Supreme Court of Alabama within the time permitted by Alabama law, and the Supreme Court of Alabama on May 24, 1956, denied said petition for certiorari.)

This appeal is taken pursuant to 28 U.S.C., Section 1257 (2).

II. The Clerk will please prepare a transcript of the record in this cause for transmission to the Clerk of the Supreme Court of the United States and include in said transcript the following:

1. Summons and complaint.
2. Demurrers to complaint.
3. Judgment sustaining demurrers.
4. Judgment entering non-suit.
5. Judgment of Alabama Court of Appeals affirming the [fol. 28] judgment of the Lee Circuit Court of Alabama.
6. Opinion of the Alabama Court of Appeals.
7. Order of the Supreme Court of Alabama denying certiorari.

III. The following questions are presented by this appeal.

1. Whether Section 130(a) (which Section was captioned "Transient or Itinerant") of Ordinance No. 103-53 of the City of Opelika, Alabama (which Ordinance was captioned "City License Schedule for 1953"), levying a \$250.00 annual flat sum license tax for 1953 upon each person, firm or corporation which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were "transported from a point *without*—Opelika," violated the Commerce Clause of the United States Constitution (U. S. Const. art. I, Section 8, cl. 3), and the Equal Protection and Due Process clauses of the United States Constitution (U. S. Const. amend. XIV, Section 1) as applied to appellant; during all of 1953 appellant was a Georgia corporation engaged in the wholesale grocery business, its place of business was in the State of Georgia, all of its deliveries of groceries in Opelika were pursuant to orders accepted in

Georgia and were at the end of a continuous interstate movement from Georgia to Opelika, Alabama; and appellant had no office, storeroom or place of business whatsoever within the State of Alabama and had no inventory or store of goods within the State of Alabama for the purpose of making deliveries in the State of Alabama; or for any other purpose.

2. Whether the above Section 130(a) as so applied violated the said Commerce, Equal Protection and Due Process clauses, particularly since another provision of the same Ordinance (being Section 82 thereof) levied an annual license tax upon each wholesale merchant which unloaded or delivered groceries at wholesale in the City of Opelika, Alabama, which groceries were "transported from a point *within*—Opelika," at a graduated amount apportioned according to the gross receipts derived from such local business.

3. Whether the foregoing Section 130(a) as so applied [fol. 29] violated the said Equal Protection and Due Process clauses particularly since another section of the same Ordinance (being Section 130 thereof) levied an annual license tax of only \$100.00 upon itinerant grocers conducting the same operation as appellant except for the selling of such groceries at retail rather than at wholesale.

(Signed) M. R. Schlesinger, Attorney for the West Point Wholesale Grocery Company, Appellant.

Of Counsel: N. D. Denson, Opelika, Alabama. Tom B. Slade, Columbus, Georgia.

PROOF OF SERVICE (omitted in Printing)

[fol. 30] Clerk's Certificate to foregoing paper omitted in printing.

[fol. 31] SUPREME COURT OF THE UNITED STATES, OCTOBER
TERM, 1956 .

No. 478

WEST POINT WHOLESALE GROCERY COMPANY, Appellant

vs.

THE CITY OF OPELIKA, ALABAMA

ORDER NOTING PROBABLE JURISDICTION—December 3, 1956

Appeal from the Court of Appeals of the State of Alabama.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is transferred to the summary calendar.

December 3, 1956.

(3743-2)